EMPLOYMENT TRIBUNALS

Claimant: Mr V Judic

Respondent: JD Sports Fashion PLC

CERTIFICATE OF CORRECTION

Employment Tribunals Rules of Procedure 2013

Under the provisions of Rule 69, the reserved judgment sent to the parties on 25 May 2017, is corrected as set out in block type at paragraphs 183-187.

Employment Judge Ross

Date 7 June 2017

SENT TO THE PARTIES ON

13 June 2017

FOR THE TRIBUNAL OFFICE

Important note to parties:
Any dates for the filing of appeals or reviews are not changed by this certificate of correction and corrected judgment. These time limits still run from the date of the original judgment, or original judgment with reasons, when appealing.

EMPLOYMENT TRIBUNALS

Claimant: Mr V Judic

Respondent: J D Sports Fashion PLC

HELD AT: Manchester **ON:** 8, 9 and 10 May 2017

BEFORE: Employment Judge Ross
Mr R W Harrison
Mrs C A Titherington

REPRESENTATION:

Claimant: Mr G Turner, Solicitor
Respondent: Ms L Amartey, Counsel

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's claim for unfair (constructive) dismissal is well-founded and succeeds.

2. The claimant's claim in the alternative that he was automatically unfairly dismissed pursuant to section 104 of the Employment Rights Act 1996 is not well-founded and fails.

3. The claimant's claim that he suffered detriment as a consequence of making a flexible working request pursuant to section 80F of the Employment Rights Act 1996 is not well-founded and fails.

4. The claimant's claim for direct sex discrimination pursuant to section 13 of the equality Act 2010 is not well-founded and fails.

REASONS

1. The claimant was employed by the respondent as a Store Manager at one of their stores in the Trafford Centre, Greater Manchester. The claimant had worked for the respondent and its predecessor, Tessuti, from October 2010 up to his resignation. The claimant gave a letter of resignation to his manager, Colette Baxter, on Monday 1 August 2016, having telephoned her on 29 July to inform her he would resign the following Monday. It is not disputed that he worked his notice period. In his witness statement he stated that he worked until 2 September 2016.

2. The claimant brought claims for constructive dismissal pursuant to section 95 and section 98 of the Employment Rights Act 1996 ("ERA 1996"); a claim that he was automatically unfairly dismissed pursuant to section 104 of the ERA 1996 because the respondent had, he alleged, infringed a right of his which was a relevant statutory right, namely section 80F ERA 1996. He also alleged that he had suffered detriments for making a flexible working request pursuant to section 80F of the ERA 1996, and he alleged direct sex discrimination.

3. At a case management hearing before Employment Judge Howard on 9 January 2017 the issues between the parties were agreed. The List of Issues was adopted at the outset of the hearing, although the final straw and the period relevant to the constructive dismissal were clarified. The issues were agreed as follows:

Was the claimant dismissed?

(1) Was the claimant entitled to terminate the contract under which he was employed by reason of the respondent's conduct (section 95(2)(c) ERA 1996)?

Constructive Dismissal

(2) Did the respondent commit a significant breach of implied and/or express terms in the claimant's contract amounting to a repudiatory breach of it?

(3) Did the claimant resign because of the breach?

(4) The claimant asserts (paragraph 50 grounds of claim) that a number of acts or omissions amounted to a cumulative breach of the implied term of trust and confidence. The claimant relies upon those matters set out in his grounds of claim at paragraphs 5-44 of his claim form as the relevant acts or omissions.

(5) The acts or omissions relate to the period commencing 28 January 2016 and the conduct of a new manager and included a negative response to flexible working requests and holiday requests, and related stress referred to in the claimant's grievance of 13 May 2016 heard on

23 May 2016. In addition the claimant raised concerns on 7 May 2016 regarding unfair criticism of him and his team.

(6) The final straw is referred to at paragraph 45 of the claim form:

"During his week's annual leave the claimant reflected on all the events and incidents concerning his employment (detailed above) since the start of the year. The final straw was the fact that Jenny Wildman had made allegations which were later proved to be false."

(7) The respondent denies that all of the alleged breaches took place (paragraph 2 grounds).

(8) If so, did those activities individually or taken together constitute a breach of the claimant's contract?

(9) Did those breaches either individually or taken together constitute a fundamental breach?

(10) If so, did the claimant affirm the contract and/or waive the breaches?

(11) If the claimant did not so affirm his contract or waive the breaches did he resign in response to the breach?

(12) Was the reason or principal reason for the claimant's dismissal that he had alleged that the respondent had infringed a right of his which was a relevant statutory right (namely section 80F ERA 1996) and therefore automatically unfair (section 104 ERA 1996)?

(13) If so, was his dismissal fair in all the circumstances?

Detriment as a consequence of making a flexible working request – section 80F ERA 1996

(14) It is accepted that the claimant made a flexible working request within the statutory scheme.

(15) Did the respondent engage in any of the activities set out above (i.e. paragraphs 5-44 of the claim form)?

(16) If so, did they constitute a detriment?

(17) If so, was this because the claimant had submitted (or proposed to submit) such a flexible working request and/or a related grievance by way of email dated 13 May 2016?

Direct sex discrimination – section 13 Equality Act 2010

(18) Did the respondent engage in any of the activities set out at paragraph 1 above?

(19) If so, did the respondent treat the claimant less favourably than a hypothetical comparator, namely a female making requests because of childcare?

(20) If so, was this because of the claimant's sex?

4. There was no reference in the List of Issues to a breach of the ACAS Code of Practice. There was no reference in the claim form to a breach of the ACAS Code of Practice. However, during the course of the hearing the claimant's representative stated that the claimant wished to allege a breach of the ACAS Code of Practice and made submissions to that effect at the end of the hearing. The respondent raised the matter that the matter had never been pleaded. At the submission stage they also raised failures on the claimant's part to comply with the ACAS Code.

Witnesses

5. We heard from the claimant, from Mr K Ishii and Mr E Davis. Mr Ishii and Mr Davis were former employees of the respondent. Mr Davis was a former sales assistant and Mr Ishii a former supervisor. For the respondent we heard from Mr P Orange, Head of Fashion Retail; Ms C Baxter, Area Manager; Mr T Hall, Regional HR Manager; and Ms J Exford, Area and Operations Manager.

Findings of Fact

We find the following facts:

6. In order to focus its findings the Tribunal has grouped the matters at paragraphs 5-44 into the following topics:

(1) The alleged requirement to work 9.00am to 6.00pm shifts – paragraphs 5, 6, 7 and 8.

(2) Parental leave requests – paragraphs 9, 11, 14 and 29.

(3) Annual leave – paragraphs 10, 13, 19, 20, 25, 26, 27 and 35.

(4) Sick leave/illness – paragraphs 12, 15, 16, 17, 18, 21 and 22.

(5) Flexible leave request – paragraphs 23, 28 and 33.

(6) Grievance – paragraphs 24, 28 and 34.

(7) The incident in the store on 14 June 2016 – paragraphs 30, 31 and 32.

(8) The request to meet Colette Baxter following the incident on 14 June 2016 – paragraphs 36 and 37.

(9) The store audit – paragraph 38.

(10) The attendance of Ms Wildman at the store – paragraph 39.

(11) Investigation and disciplinary process – paragraphs 40, 41, 42, 43 and 44.

(12) The alleged final straw – the false allegations of Ms Wildman.

Requirement to work 9.00am to 6.00pm – paragraphs 5, 6, 7, 8 and 15 of the claim form

7. The Tribunal finds that on 28 January 2016 the claimant's line manager, Jackie Grant, sent an email to him and the other store managers about store scheduling/rota. She informed the managers:

> "After a review of store scheduling/rotas it has been agreed that all stores use the same format. Please see below required changes. (To be implemented from Sunday 31/1)."

8. In relation to the manager/assistant manager it stated:

> "Work 8 hour shift, 9 hour per day, example 8-5/9-6/1-9 etc. Avoid scheduling SM/AM on early shifts (6.00am-3.00pm). Management to be scheduled in line with the demands of the business (i.e. where late opening is applicable)."

9. It is not disputed that the claimant had worked for the respondent's predecessor since October 2010 at the same store, Tessuti. We rely on the claimant's evidence at paragraph 10 of his statement to find that for the previous four years the management early shift at his store was 8.00am to 4.30pm or 8.30am to 5.00pm with a 30 minute lunch break. We rely on the claimant's evidence that that enabled efficient store operational set up and minimal time off the sales floor for lunch at peak times.

10. It is not disputed that in January 2016 the claimant had a young daughter (date of birth: 24 August 2014). We accept the claimant's evidence that his wife worked as a Regional Manager for The Body Shop and at that time was travelling regularly to the North East. We accept his evidence that it was part of his responsibility as a parent to collect his daughter from the childminder some days during the week.

11. It was not dispute by Mr Orange that there was no consultation with the store managers about the change to the rota.

12. We accept the evidence of the claimant that a finish time after 5.00pm and in particular after 5.30pm presented him with great difficulty as he had insufficient time to collect his daughter at a reasonable time from the childminder.

13. We find the email of 28 January 2016 did issue an instruction that all stores should use the same format and that shifts should be nine hours i.e. an eight hour shift with a one hour lunch. However, we find there was no direct instruction that this

had to be 9.00am to 6.00pm because the email gave other examples i.e. 8.00am to 5.00pm, 1.00pm to 9.00pm.

14. We find that the claimant responded on 5 February 2016 explaining that he had retained the 8.00am start and he gave business reasons for doing so (see page 53). Ms Grant's reply sent on the same day indicated no objection.

15. However, we accept the claimant's evidence that this was not the end of the matter. We accept the claimant's evidence, which was given in cross examination, that he was placed under pressure by Ms Grant to move to a 9.00am to 6.00pm shift pattern. The claimant said repeatedly in cross examination:

> "Jackie forced me to do 9 to 6 and when I found others were not I couldn't understand it."

He said:

> "Jackie said to me, 'Vin, do 9 to 6'."

16. He explained he had almost daily dealings with his Area Manager, usually over the phone. The claimant agreed that he did not mention childcare to his manager in his initial email. He explained at that point he was trying not to put it across as a personal issue because he thought there were also sound business reasons why it made sense for him as the store manager to have an earlier start time with a shorter lunch. The claimant said there were later emails which confirmed his account.

17. The claimant said Ms Grant told him she had no choice but to make these changes to the shift pattern. We accept the claimant's evidence that each week he had to ask if he could finish on the early shift pattern finishing at 5.30pm. (It was not disputed that the claimant worked a shift pattern involving different finish times.)

18. We accept the evidence of the claimant that each week for a period of approximately 4-5 weeks he asked Ms Grant via a phone call or email if he could work the early shift pattern finishing at 5.30pm. We accept the claimant's evidence that he did inform Jackie Grant that the reason for needing to work an earlier shift pattern was because of his childcare. This is reflected by page 64 of the bundle, an email sent by the claimant on 25 March 2016 in which he says: "Hi Jackie, before I send amended rota am I still ok to do two 5.30 finishes?"

19. We find that this is consistent with the claimant's evidence that there was an expectation imposed by Ms Grant that he should work the 9.00am to 6.00pm shift pattern and that if he wanted to finish earlier he needed to request this. The response on that date is terse. It is sent from Ms Grant's phone and simply says: "Need to go to 9-6.00pm please".p64

20. The claimant then replied:

> "Ok Jackie, but as I discussed previously with you this will have a very negative impact on my childcare situation, which is already stressful due to the recent required shift changes for myself. I don't feel the very small potential gain of me staying until 6.00pm (half hour) is worth the negative

> impact on my welfare and therefore can't be in the best interests of the business. I feel I am being unfairly treated as a new parent and will therefore consider how I want to raise my concerns officially."p64

21. Although Ms Grant left the respondent in or around the end of April 2016, the Tribunal was informed at the hearing that she has recently re-joined the company. Ms Grant did not attend the Tribunal as a witness.

22. We find that after Ms Grant refused the claimant's request, "Am I still ok to do two 5.30 finishes?" by stating "Need to go to 9-6 please" she failed to respond to the following email where the claimant detailed his difficulty with doing this and in particular his childcare commitments. We find the insistence he work 9-6pm and the failure to respond to his concerns about this caused the claimant to feel very stressed and unwell. We find he called in sick on 26 March 2016. We accept his evidence that he went to his GP on Monday 28 March 2016 who signed him off with work related stress for seven days.

23. We find the claimant's account that Ms Grant insisted on the shift change of 9.00am to 6.00pm to be consistent with the claimant later making a formal flexible working application. If Ms Grant had not insisted on 9.00am to 6.00pm but had permitted the claimant to work an earlier shift with a half hour lunch as she had done previously there would have been no need for him to make a flexible working application.

24. When the claimant was transferred to JD Sports from Tessuti he signed a new contract of employment which is dated 30 April 2013 at pages 152-159 of the bundle (this document was produced on the second day of the hearing by the claimant. The respondent said it was not held with its records). There were two other contracts in the bundle. One is at pages 100-104 which is dated 24 June 2016 which both parties agree was produced after his flexible working application was granted (see later). The other is at pages 31(a)-(b) dated 18 April 2011 and is the claimant's Tessuti contract.

25. The contract dated 30 April 2013 has no clause about hours of work. That contract had not been produced in the Tribunal at the time the claimant was cross examined. The claimant was cross examined on the contract at pages 31(a)-(b) of the bundle. That contract has an "hours of work" section:

> "Your hours of work are normally 40 per week, five days out of seven with a 30 minute unpaid break each day. You will normally be entitled to one weekend off approximately every six weeks. You are required to work additional hours when authorised and as necessitated by the needs of the business."

26. Under "remuneration" it states:

> "Payment will not be made for additional hours worked."

27. The claimant did not dispute when cross examined that there were no specific contractual requirements in relation to shift arrangements.

Applying the law to the facts

28. The Tribunal reminds itself that all contracts of employment have an implied duty of trust and confidence namely that an employer will not, without reasonable or proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee. See **Courtaulds Northern Textiles Limited v Andrew [1979] IRLR 84 EAT**

29. Mr Justice Browne-Wilkinson described a breach of this term in the following way:

> "The Tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it."
>
> **Woods v W M Car Services (Peterborough) Limited [1981] ICR 666 EAT**

30. The Tribunal also reminded itself of the guidance in **Malik v BCCI**.

31. The first issue is whether the conduct described in paragraphs 5, 6, 7 and 8 of the claim form in relation to the change of shift can be described as a breach of the implied duty of trust and confidence.

32. We rely on our finding of fact that Ms Grant insisted the claimant change his shift pattern to 9.00am to 6.00pm by text message on 25 March 2016 despite the fact she knew that this put him in difficulties with his childcare arrangements. She failed to respond to his email of the same date. The Tribunal must consider whether there was any breach of the implied duty of trust and confidence in relation to the enforced shift change.

33. The Tribunal has taken into account that once the claimant made a formal request for flexible working (see below) it was properly considered by the respondent and granted on 14 June 2016.

34. The Tribunal finds that given the relevant contract of employment is silent about shifts and given that the respondent by letter 14 June 2016 granted the claimant's flexible working request so he could leave at 5.30pm 2 days a week so did not have to work 9am-6pm on those 2 days and given that until 25/3/16 Ms Grant had allowed the claimant to work a shift leaving at 5.30pm instead of working 9-6pm , the enforced shift change between 25/3/16-14/6/16 does not amount to breach of the implied duty of trust and confidence .

35. However the Tribunal finds that the fact Ms Grant enforced the shift change on 25 March despite the claimant's concerns and without responding to his email of 25 March amounts to a part of the cumulative breach of the implied duty of trust and confidence. Ms Grant did not give an explanation to the claimant as to why the flexible working pattern 8.30-5.30pm later granted by Mr Hall was not permitted by her after 25/3/16 although she had previously allowed it. This insistence on the shift

change without an explanation as to why the claimant could not be permitted to work flexibly had a part to play in the cumulative breach.

Parental leave – paragraphs 9, 11, 14 and 29

36. The Tribunal finds that there were three applications for parental leave. The first application is at page 54. It was dated 11 February 2016 and was for the period 5 June 2016 for one week. It was authorised by Jackie Grant and confirmed by HR (see page 55).

37. The second parental leave request (page 60) was made on 14 March 2016 for one week from 5 April 2016. That request was refused by Ms Grant. (see page 63).

38. The Tribunal had regard to the holiday rules of the respondent at pages 160-161 of the bundle. Those rules are in relation to holiday but not parental leave. However they explain that:

> "Annual holiday may not be taken at the following times of year due to business needs: Easter week/1 December until 7 January."

39. The Tribunal accepted evidence from the claimant that the Trafford Centre serves a wide geographical area and covers a number of different Local Authorities with differing school holidays. The Tribunal finds that in 2016 Easter fell early at the end of March on Friday 25 and Monday 29 March. It accepts the evidence of the claimant that some schools had holidays prior to Easter and some had holidays after Easter.

40. We find the reason for the holiday rules restricting time off at Easter and over the Christmas period is because these are very busy trading times for the respondent. We find it is clear from Ms Grant's email that the refusal was for business reasons because she considered the period of 5 April which was the week after Easter Monday 29 March to be "peak trading".p63

41. The third parental leave request was made by the claimant on 15 April 2016 for 8 May 2016 for one week. It was cancelled by the claimant himself (see page 81) because his assistant manager, Simon, would be off that week due to an operation and he felt it would leave the business short of cover.

42. The claimant refers to an email of 24 May 16 at paragraph 33 of his witness statement and paragraph 29 of the claim form in which Colette Baxter questioned if the parental leave booked for June had previously been authorised. The parental leave had been authorised on 20 February 2016 by HR.

43. The Tribunal does not attach any significance to that email from Ms Baxter. It is not disputed that Ms Baxter at that time was a new manager of the claimant having commenced on 2 May 2016. The Tribunal finds it is not unusual for a manager to check leave information for staff approved before the manager has taken up the new role.

44. The Tribunal is not satisfied there is any breach, whether individual or cumulative, of the implied duty of trust and confidence in relation to parental leave.

45. The claimant made requests: one was granted, one refused and one he withdrew. The Tribunal finds that although the claimant disagrees with the reasons given for refusing the request for the week commencing 5 April 2016, the respondent had genuine arguable business reasons for doing so and the claimant agreed that although he considered the store could cope adequately at the relevant time without his presence it was in a period close to Easter, a busy trading period for the respondent.

Annual leave – paragraphs 10, 13, 19, 20, 25, 26, 27 and 35

46. The Tribunal finds that on 2 March 2016 the claimant requested his annual leave dates (see page 58). On 21 March 2016 at page 62 an email was sent by Ms Exford to all managers informing them that there would now be a two week holiday "blackout" at Easter. This was an increase in the amount of time leave would not be granted because the holidays rules refer to "Easter week"

47. The Tribunal finds that the respondent's holiday policy at pages 160-162 is ambiguous at page 161 paragraph 11(a) where it refers to annual leave may not be taken during "Easter week". There are two Bank Holidays over Easter. They are Good Friday and Easter Monday. They always fall in separate working weeks.

48. The Tribunal finds there was a delay in Jackie Grant authorising the claimant's holiday. She did not authorise it until 15 April 2016 (page 67) after the claimant had chased it up. That is a delay of six weeks.

49. The Tribunal finds that the claimant's Area Manager, Jackie Grant, left and Colette Baxter was appointed. Ms Grant left at the end of April and Ms Baxter started as the claimant's manager on 2 May 2016.

50. On 12 May 2016 the claimant submitted a holiday request for one day to attend a funeral on 19 May and time off to move house (see page 86). It is not disputed that Ms Baxter was absent for one week on holiday from 14 May 2016.

51. As the date of the funeral approached the claimant became increasingly concerned at the lack of reply. He forwarded his request to Jenny Exford on 14 May in an effort to chase it up (see page 85). A further request was made to Ms Exford on 16 May (p88) and the request for a day off for the funeral was authorised by her the day before the funeral at 8.19am on 17 May.

52. The claimant also requested time off for holiday on 27 May (page 86). That request was made on 12 May. Ms Exford replied on 17 May asking who was running the store (see page 88). The claimant replied (see page 85). Ms Exford refused the request saying that it was key trading day but she did offer him days off in the following week.

53. On 23 June 2016 at page 110 the claimant sought three days off in August. The reply received from his manager, Colette Baxter, on 4 July at page 110 raised further questions. The claimant replied to the questions but Ms Baxter never replied so the authorisation was never given.

54. The respondent had discretion under their holiday policy whether or not to grant holidays. The Tribunal is not satisfied that the respondent's failures detailed above were sufficient to amount to an individual breach of the implied duty of trust and confidence. The Tribunal accepts the evidence of Ms Exford that she received a huge number of emails each day and is not satisfied that her delay in responding to the claimant's request in relation to the funeral, which she was picking up from the claimant's direct manager who was on holiday, nor the refusal of the holiday for the claimant's house move, can amount to a breach of the implied duty of trust and confidence.

55. However, there was no explanation as to why Ms Grant took six weeks to authorise the claimant's holidays or why Ms Baxter never responded to the claimant's request for holidays in August. The Tribunal has taken into account that Ms Baxter responded extremely promptly to the holiday requests from the claimant's assistant manager, Simon. He made a request for two days' holiday in September on 23 June and he received an immediate response granting his request (see page 107). By contrast the claimant's request for three days' holiday in August also made on 23 June was never fully responded to and thus was not authorised. In cross examination Ms Baxter had no explanation for her failure to reply to the claimant.

56. Taking this into account we find the failure of Ms Grant to reply for 6 weeks before granting the claimant holidays and the failure of Ms Baxter to respond at all to the claimant in relation to his request for holiday on 23 June 2016 is part of the cumulative breach of the implied duty of trust and confidence.

Sick leave/illness – paragraphs 12, 15, 16, 17, 18, 21 and 22

57. The claimant attended hospital on 18 March 2016 (see page 61). The claimant was not paid for this absence. The Tribunal notes that on 28 April 2016 at page 72 the claimant was questioning why he had not received any sick pay for this absence when he had to attend the eye hospital. According to his statement he never received a reply in relation to that although we take into account that this is close in time to when Jackie Grant left the business. We note that the claimant has not specifically complained about the failure to pay him in March as a breach of the implied duty of trust and confidence

58. The claimant was absent from 29 March 2016 to 12 April 2016. The reason for his absence was work related stress. The Tribunal accepts the evidence of the claimant that he sent in sick notes to cover his stress related absence. We rely on his examination on cross examination and the account given in his grievance letter dated 13 May 2016 which was completed close in time to his period of absence. It gives a detailed account. The claimant explained (see page 83):

> "I called Jackie on Saturday morning to say I wouldn't be in for work that day due to my symptoms and would seek medical advice from my doctor.
>
> As Sunday was my scheduled day off, on Monday I called my doctors to explain my continuing symptoms and they booked me in for an appointment that day. I called Jackie to say I would be off work and that I would update her after seeing the doctor. The doctor assessed my symptoms and gave me a

> sick note for work related stress for one week. The doctor arranged for me to take home a home monitoring blood pressure kit so I could monitor my raised blood pressure over the week. I called Jackie to inform her of my absence and duly sent my sick note to the store. As my return to work date neared I felt very anxious about work and still had not been sleeping. I had another appointment with my GP who gave me a sick note for a further seven days. I called Jackie to inform her of my further absence and again sent my sick note to the store."

59. We also accept the claimant's evidence in cross examination that he, as a store manager, knew the importance of sending in sick notes and had seen them on the computer system when he returned to work. We also have taken into account the record in the bundle at page 65 which shows that the claimant also spoke to Simon, his assistant manager on his first day of absence.

60. At the time of the claimant's absence the claimant was working under a contract which had a clause giving the company discretion whether or not to pay company sick pay (see page 153 paragraph 6.1):

> "In addition to the statutory sick pay scheme for which the qualifying days will be Monday to Sunday, the company operates a discretionary sick pay scheme for employees (after successful completion of trial period), details of which are as follows…"

61. What is puzzling for the Tribunal is that the respondent's witnesses said that they were unaware of the fact that the claimant was working under this contract. Mr Hall said he believed that the claimant was working under his old Tessuti contract which entitles the claimant to statutory sick pay only (see page 31(a)):

> "There is no contractual sickness/injury payment scheme in addition to SSP."

62. As part of his grievance the claimant raised his concerns about failure to pay sick pay:

> "During the second week I started to worry about whether I would get paid for any of my absence and I called Jackie to enquire. Jackie said she did not know but would contact HR and would call me back in the week. On the Friday Jackie called me to inform me that I would not be paid for any of the absence and that the decision had been made by Paul Orange. This decision obviously added to my stress as I worried about my finances if I lost two weeks' pay. I was due back in work on Wednesday 13th but called the doctor to sign me fit to return from the 12th so I wouldn't lose any more pay…I was advised that sick pay is discretionary therefore no reason needs to be given."

63. The Tribunal also relies on the evidence from the claimant's own GP sent in a letter after the event for the purpose of these proceedings stating that he had certified the claimant's absence. See p131.

64. At the Tribunal Mr Hall and Mr Orange said that the reason the discretionary sick pay was not paid to the claimant was because he had failed to provide sick notes to

the respondent. This is inconsistent with Mr Hall's evidence that he thought the claimant was working under a Tessuti contract which entitled him to SSP only.

65. Despite the claimant raising his concern about the failure of the company to pay him sick pay, Mr Hall did not tell the claimant why the sick pay had been withheld. He just stated:

> "I uphold the decision to withhold the discretionary payment of company sick pay for the period 26 March 2016 to 12 April 2016."

66. Whether or not to pay company sick pay is discretionary. However, we find that the failure to give the claimant a reason why the company exercised their discretion amounts to a breach of the implied duty of trust and confidence. We find a failure to give the reason for exercising the discretion not to pay company sick pay is conduct calculated or likely to destroy the implied duty of trust and confidence.

67. If the reason really was as suggested by the respondent that the claimant had failed to supply sick notes, then if they had informed him of that fact the claimant could have brought the sick notes he had sent in to the respondent's attention and further consideration could have been given.

68. We find that the way the claimant was dealt with in relation to his sick leave, in particular the failure of the respondent to give him a reason at the time for refusing company sick pay for his absence 29 March – 12 April 2016 amounts to both an individual breach of the implied duty of trust and confidence and part of a cumulative breach of that duty.

Flexible working request – paragraphs 23, 28 and 33

69. The claimant made a flexible working request by email on 29 April 2016 (see page 73). At the request of the HR department he completed the appropriate flexible working form (see pages 75-79). In it he formally requested that he would finish at 5.30m instead of 6.00pm and have a half hour lunch break on the days when he was working, an "early shift" 9.00am-6.00pm. That request was discussed at the grievance hearing which took place on 23 June 2016 with Mr Hall. The claimant's request was granted on 14 June 2016 in a letter from Mr Hall (see page 99).

70. There had been a short delay in arranging the grievance hearing which included discussion of the flexible working request. It had originally been scheduled on 19 May 2016 which the claimant was unable to attend because he was at a funeral.

71. We find no significant delay in discussing the claimant's flexible working request once he had made it in writing. Once the claimant made the request it was considered appropriately and granted. We find no breach of the implied duty of trust and confidence in relation to the flexible working request

Grievance – paragraphs 24, 28 and 34

72. The Tribunal finds that the claimant emailed Dave Light who was the original Tessuti owner on 7 May 2016 raising some concerns. The Tribunal finds that Mr

Light advised the claimant either to meet Paul Orange or his Area Manager or use the grievance procedure (see page 82).

73. The claimant presented a grievance dated 13 May 2016 (see pages 83-84). The claimant agreed in cross examination that this grievance was primarily about the non payment of company sick pay for his absence on 29 March 2016 to 12 April 2016. In the course of his grievance he also complained that he was suffering work related stress due to shifts being forced upon him. He also raises other concerns including:

> "Upon returning to work I have received no 'return to work' interview, no counselling offered about my illness/work situation or any concern from Jackie before she left or anyone else in the company."

74. He also raises the fact he has not received a reply to flexible working request.

75. In his claim form at paragraph 28 the claimant appears to complain that, "there was no witness or note taker present". At paragraph 34 the claimant states:

> "On 26/6/16 the claimant received a letter informing him that his grievance was not upheld but not all points raised were answered."

76. The claimant had raised by email dated 17 May 2016 to Nima Yates, of the respondent's HR department, concerns about the late reply granting his request to attend a funeral and the refusal to allow him a day off to move into his new home (see page 79(a)). He specifically asks, "will you forward this to the relevant person to be also raised at my grievance hearing?".

77. We accept the evidence of Mr Hall in cross examination that the email of page 79(a) was never forwarded to him by the HR Manager, Nima Yates, and so he did not consider it at the grievance hearing.

78. The claimant makes it clear in his statement that he had expected the email to Nima Yates to be dealt with. He also complains the respondent did not deal with his area of concern about work related stress and other "detriments" where he says he was treated unfairly.

79. The Tribunal finds that the grievance took place on 23 May 2016 and only the claimant and Mr Hall were present. The Tribunal finds that the primary focus of the grievance was the non payment of sick pay for 29 March 2016 to 12 April 2016, but the claimant did raise other concerns in particularly he was suffering from a stress related illness and that the reason for that illness was the way he was treated by his manager, Jackie Grant.

80. The Tribunal finds that Mr Hall did not answer all the points raised by the claimant. The Tribunal found that Mr Hall's evidence in relation to his investigation concerning the non payment of sick pay was unclear. Given that he said he was working from the claimant's Tessuti contract it was difficult to understand why Mr Hall thought the claimant was entitled to sick pay at all. Mr Hall agrees that he did not specifically ask Mr Orange why the claimant had not received discretionary sick pay.

81. Mr Hall did not inform the claimant of the reason why he was not paid sick pay despite an indication at the meeting that the claimant wished to know. We find that Mr Hall also failed to deal with the issue raised at page 79(a) because it was never sent to him.

82. We make no specific findings in relation to the fact that the respondent does not specifically address the work related stress issue. We accept the evidence of Mr Hall that he understood the grievance to be primarily about failure to pay sick pay and the flexible working issue and he did investigate the flexible working request and it was granted.

83. Furthermore, the claimant never appealed the grievance outcome and if he had been concerned about the failure of the respondent to investigate the stress related issue we find it is likely he would have done so.

84. Therefore in conclusion we find there was a breach of the implied duty of trust and confidence in the failure of the respondent to inform the claimant of the reason why he was not being granted company sick pay as we have already referred to in the allegations relating to sick leave.

85. We find that there was the failure to address his specific concern in relation to the late granting of holiday in relation to a funeral and the refusal to grant holiday in relation to moving into a new home played a part in the cumulative breach of the implied duty of trust and confidence.

Incident in the store on 14 June 2016 – paragraphs 30, 31 and 32

86. There is no dispute that on 14 June 2016, the claimant's first day back following parental leave, Paul Orange and Colette Baxter visited the store.

87. The claimant accepted in cross examination that at the time of the visit the store was not presented at the standard he would have liked. It was agreed that a sale had just started. It is not disputed that Mr Orange and Ms Baxter were critical of the presentation of the store. There was a dispute of fact as to what was said and the level of criticism.

88. Mr Orange agreed that he did express concerns to Mr Judic but did not raise his voice. In his statement he said:

> "I cannot recall the precise details of the conversation or describing the store as a 'shit hole'. I do have a very direct style of speech though as I do think it is important that everyone understands what is expected of them."

89. There is no reference in the ET3 to the words the claimant alleges Mr Orange had spoken. In cross examination Mr Orange was unclear if he had ever been shown the contents of the ET3.

90. The claimant said during the store walk Mr Orange raised his voice and stated:

> "This store is a car crash and looks like a shit hole."

91. There is no dispute that any comments made by Mr Orange were made on the shop floor and that the store was open at the relevant time during a sale and it was therefore likely customers were present.

92. The Tribunal heard from Mr Davis and Mr Ishii who worked for the respondent and were on the shop floor that day. Both men said they were aware of the visit by Mr Orange and Ms Baxter and they could see from the claimant that he was upset by comments. Neither Mr Davis nor Mr Ishii heard the specific comments.

93. The claimant alleged Colette Baxter said to him on the sales floor in front of customers and the staff that he was a negative influence on his assistant manager, Mr Fox. The claimant said that he informed Ms Baxter that her conduct was aggressive and unprofessional and that the discussion should be continued privately in the office away from the sales floor.

94. Ms Baxter disputes that she berated Mr Judic. She said:

> "We began having a conversation on the shop floor but I firmly believe that we could not be overheard by any customers or staff. As Mr Judic became a little agitated I suggested that we move into the office."

95. Both Ms Baxter and Mr Judic agreed that the conversation continued in the office. The claimant alleges Ms Baxter said that in her opinion the sales performance of his store was "by default" and "nothing to do with my performance or ability as a manager".

96. Ms Baxter admits that she said the store took money by default. She said she felt this was largely due to some desirable brands the store sold and that the store was in decline with month on month figures going down. It is not disputed at this point Ms Baxter had only been in post as the claimant's manager for 6 weeks. Of that time he had been on leave for a week and she had been on holiday for a week.

97. When cross examined Ms Baxter agreed that she had only been looking at the sales figures for the previous few months and not over the five years that the claimant had been manager of the store.

98. The Tribunal prefers the claimant's evidence in relation to this incident. The Tribunal finds that the claimant has been a clear and consistent witness. The Tribunal finds that the words "car crash" and "shit hole" were spoken by Mr Orange, who agrees he has a direct style. The Tribunal finds it more likely that the claimant's recollection is accurate. He was raising his concerns about the remarks made to him soon after the event by seeking a meeting with Ms Baxter whereas by the time Mr Orange prepared his witness statement many months later he was unable to recall the precise details of the conversation.

99. The Tribunal finds it is entirely inappropriate to criticise a manager's performance on the shop floor where customers are likely to be present when a store is open, and the sales staff are also likely to be present. The Tribunal finds it is very poor business practice to criticise a manager where customers and staff are potentially present.

100. The Tribunal accepts the claimant's recollection of the meeting in the office and that Ms Baxter had started by criticising him on the shop floor and continued to criticise him in the office by informing him the sales performance of his stores was "by default".

101. The Tribunal has also taken into account that at the time Ms Baxter made these comments she was very newly appointed as the claimant's manager, having commenced on 2 May. The store visit took place on 14 June, approximately six weeks later, and of that six week period Ms Baxter had been on annual leave for one week and the claimant had been absent on parental leave for one week.

102. We accept the claimant's evidence that he felt belittled and humiliated by the comments made on the shop floor by Mr Orange and Ms Baxter, and further undermined as a manager by the comments made to him by Ms Baxter in the office.

103. The Tribunal has taken into account that the claimant raised his concerns in an email of 1 July:

> "Since your visit with Paul Orange on 14 July we haven't been able to discuss the issues you raised with me and I am still struggling to come to terms with some of the things that were said. Please contact me with a suitable date or time for you."

104. Ms Baxter replied promptly on the same day:

> "Send me times please, Vincent."

105. A meeting was held on 5 July 2016. Ms Baxter says she asked Ms Exford to attend as a "mediator". However, no notes were taken of the meeting.

106. The Tribunal turns to the recollection of Mr Ishii and Mr Davis. The Tribunal finds they were both genuine witnesses. Neither of them still works for the respondent; neither of them are a friend of the claimant, although they knew him professionally. We find both of them after this length of time were struggling with their recollection. We find they were honest witnesses.

107. The Tribunal concludes that the language used by Mr Orange and Ms Baxter and the fact that he and Ms Baxter criticised the claimant on the shop floor where staff and customers were likely to be present amounts to a breach of the implied duty of trust and confidence. The Tribunal finds that although a manager is entitled to criticise a more junior manager for poor performance, it is inappropriate for that to be done publicly and in unprofessional language.

Request to meet – paragraphs 36 and 37

108. It is not disputed that the claimant emailed a request to Ms Baxter and that a meeting took place. The Tribunal finds it surprising that no notes were taken of that meeting. However, the Tribunal is not satisfied there is any breach of the implied duty of trust and confidence in relation to that meeting. The claimant requested the meeting and his request was met.

Store audit – paragraph 38

109. It is not disputed that on 6 July 2016 Jenna Atkinson (Loss Prevention Regional Manager for the North West) visited the store to conduct a security audit. The audit was 67.5%.

110. The Tribunal accepts the evidence of Ms Exford whom it found to be a clear and reliable witness. It was the practice of the Loss Control Department to make unscheduled visits to a store to assess how well it was going against a security checklist. We accept her evidence that these visits generally take place every three months unless, for example, a store had an unusually high theft rate. The claimant did not dispute this. We accept the evidence of Ms Exford that if an audit score was less than 85% the store manager would always be referred to HR for potential disciplinary action.

111. The claimant alleged that he received no feedback or contact to discuss the audit or any action plan. In the absence of any evidence from the respondent that this was their standard procedure, we find on the evidence of Ms Exford to find it was routine to consider disciplinary action for a store manager with an audit score of less than 85%.

112. Accordingly the Tribunal is not satisfied there was any breach of the implied duty of trust and confidence in relation to the security audit taking place and the failure of the respondent to discuss the audit or discuss an action plan with him.

Jenny Wildman's attendance at the store

113. It is not disputed that on 12 July 2016 Jenny Wildman came to the claimant's store. We accept the evidence of Ms Exford that she was a "designate manager", namely a manager waiting for a store to become free for her to manage. The claimant did not dispute that Jenny Wildman was to spend a week in the store to receive training on Tessuti management practices and procedures.

114. The Tribunal accepts the evidence of Ms Baxter that she instructed Ms Wildman to be placed at that store.

115. The Tribunal finds the timing of the placement of Ms Wildman to be unusual. Given that this store had recently had a low audit score, 67.5%, and given that there was another store in the Trafford Centre, it seems surprising that Ms Wildman was sent to this store.

116. Nevertheless, the Tribunal accepts the evidence of Ms Exford and finds that it was standard practice for a designate manager to be assigned to a store in this way and finds no breach of the implied duty of trust and confidence in assigning Ms Wildman to that store.

Investigation and disciplinary process – paragraphs 40, 41, 42, 43 and 44

117. The Tribunal finds that on 19 July 2016 Jenna Atkinson visited the store with a colleague asking for a private meeting with the claimant in his office. The claimant was told she was investigating alleged breaches of security by him. The first

allegation concerned a photograph taken on a mobile phone by Jenny Wildman in his office at 8.45am on 12 July, her first day in store. The claimant was told the photograph was of cash till floats on the office desk with the safe open. The second part of the investigation was to discuss the security audit result from 6 July. Ms Atkinson drafted a witness statement for the claimant which he was not willing to sign at that time. The claimant says he was not shown the alleged photograph supporting this allegation. The claimant raised his concerns with Colette Baxter.

118. The claimant continued to close down the store each night, cashing up tills, searching staff and locking the premises.

119. It is not disputed the claimant was on annual leave from 20-28 July 2016. During this week he received a letter from Human Resources inviting him to a disciplinary hearing on 4 August 2016. Included with the letter was a copy of the witness statement which the claimant had earlier refused to sign. The claimant found the statement not to be a true recollection of the investigation meeting or conversation.

120. It is not disputed that later when the claimant attended a disciplinary hearing conducted by Ms Exford on 21 July 2016 (during the claimant's notice period) she took Mr Judic through each of the alleged breaches, namely leaving cash out of the safe on the office floor, leaving the shutter to the shop up with the keys left, together with the low score as against the security checklist.

121. She confirmed that during the adjournment she reviewed the relevant CCTV footage which cast doubt on the allegation that the claimant had left the front of the shop open. It also showed that whilst the cash had been left unattended in the office it was for a very short time. It is not disputed that she did not feel the allegations were proven so it would not be appropriate to move onto a formal disciplinary sanction and instead counselled him (see page 120).

122. The Tribunal turned to consider whether the disciplinary investigation and the allegations made against him by the respondent which led to a disciplinary hearing amounted to a breach of the implied duty of trust and confidence.

123. The Tribunal has taken into account that the timing of the allegations is very close in time to a period when the claimant had presented a grievance and a flexible working request.

124. However, the Tribunal relies on the evidence of Ms Exford, whom it found to be a clear and fair witness that it was standard procedure to consider disciplinary action against an individual where a store audit was below 85%. The Tribunal considered whether there has been a breach of the implied duty of trust and confidence within the meaning of the **Malik** test.

125. The Tribunal finds that if there is potentially evidence of wrongdoing an employer must be entitled to investigate the matter. The Tribunal finds that is what occurred in this case. Accordingly the Tribunal finds no breach of the implied duty of trust and confidence in relation to the investigation or disciplinary hearing.

126. Insofar as the claimant was permitted to continue to carry out his management functions at the relevant time, the Tribunal takes into account the evidence of Ms Exford that this was standard procedure.

127. The Tribunal has considered all the allegations.

128. In conclusion the Tribunal has found that there were breaches of the implied duty of trust and confidence in relation to sick leave/illness and in relation to the floor walk. The Tribunal finds that there were cumulative breaches in relation to the enforced shift change and the annual leave issue.

129. The claimant relies on a final straw at paragraph 45. The Tribunal reminds itself of the guidance in **London Borough of Waltham Forest v Omilaju 2004 CA Ewca civ 1493.**The Tribunal relies on our fact finding above and is not satisfied that the final straw, "the fact that Jenny Wildman had made allegations which were later proved to be false" is capable of amounting to a final straw because it has not found anything which could amount to unreasonable in the actions of Ms Wildman.

130. However we have found specific breaches of the implied duty of trust and confidence in relation to sick leave/illness and in relation to the floor walk incident. The Tribunal finds that there were cumulative breaches in relation to the enforced shift change and the annual leave issue. We have found the final breach, which amounted of itself to a breach of the implied duty of trust and confidence, occurred on 14.6.16 when the comments made in the floor walk incident.

131. The Tribunal turns to the next issue: did the claimant affirm the contract and/or waive the breaches. The Tribunal reminds itself that in the words of Lord Denning in **Western Excavating v Sharp 1978 ICR 221 CA** the employee must " make up his mind soon after the conduct of which he complains:for,if he continues for any length of time without leaving, he will lose his right to treat himself as discharged." We have taken into account that the last breach occurred in the floor walk incident on 14 June 2016 and the claimant resigned, giving notice on 1 August 2016. The delay is a period of approximately 6 weeks.

132. We remind ourselves of the provisions of s 95(1)(c) ERA 1996 which state an employee is dismissed where "*the employee terminates the contract under which he is employed (with or without notice" in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct*" .Accordingly the fact the claimant gave notice is not to be taken as evidence of affirmation.

133. We have taken into account that the claimant was a married man with a young child who had recently moved into a new house with a mortgage to pay. We accept his evidence that it is a "romantic notion" that an individual with substantial commitments can simply leave immediately when there has been a breach of the implied duty of trust and confidence. Accordingly although there is a delay from 14 June to 1 August we are not satisfied that this delay suggests the claimant had waived the breach. In particular we take into account that his concerns about the floor walk incident were raised with Colette Baxter at a meeting on 5 July, and that the claimant had telephoned Colette Baxter on 29 July to explain he could not continue to work for the respondent

134. We are therefore satisfied that the claimant did not waive the breach and affirm the contract.

135. The Tribunal must turn to the next issue: did the claimant resign because of the breach?

136. The Tribunal is satisfied that the reason the claimant resigned was because of the way he had been treated by the respondent. He stated in his letter:

> "I feel that I am left with no choice but to resign in light of my recent experiences which have left me with a complete breakdown of trust and confidence in the company."

137. The Tribunal finds that the way his manager, Jackie Grant, had dealt with him in terms of the shift change and failure to deal with his holidays, the way Colette Baxter had spoken to him on the shop floor and later failed to deal with his holidays, the way Mr Orange had refused his discretionary sick pay and had spoken to him on the shop floor, and the way Mr Hall failed to give a clear reason as to why he had been refused company sick pay all contributed to the breakdown of the implied duty of trust and confidence. Accordingly the claimant's claim for unfair constructive dismissal succeeds.

138. In the alternative the claimant brought a claim that he was automatically unfairly dismissed on the ground he had made or proposed to make an application under section 80F Employment Rights Act 1996 and was therefore automatically unfairly dismissed under section 104(a) and 104(b) Employment Rights Act 1996.

139. There is no dispute that the claimant made an application to request a variation of his contract in accordance with section 80F and also that the request was granted.

140. Section 104(1)(a) states:

> "An employee who is dismissed shall be regarded for the purpose of this part as unfairly dismissed if the reason (or if more than one the principal reason) for dismissal is that the employee –
>
> (a) brought proceedings under the employer to enforce a right of his which is relevant statutory right, or
>
> (b) alleged that the employer had infringed a right of his which is a relevant statutory right."

141. We have found above that the reason the claimant was constructively dismissed was for the breaches we have stated.

142. The claimant's application for flexible working was granted by the respondent. We are not satisfied there is any evidence that the employer infringed a right of his which is a relevant statutory right.

143. Accordingly this claim fails.

The claimant's claim that he suffered detriment as a consequence of making a flexible working request

144. The relevant law is section 47E Employment Rights Act 1996 which provides that:

> "An employee has the right not to be subjected to any detriment by any act or deliberate failure to act by his employer done on the ground that the employee:
>
> (a) made (or proposed to make) an application under section 80F;
>
> (b) …
>
> (c) brought proceedings against the employer under section 80H; or
>
> (d) alleged the existence of any circumstance which would constitute a ground for bringing such proceedings."

145. There is no dispute in this case that the claimant made an application under section 80F Employment Rights Act 1996. This occurred when the claimant made a flexible working request on 29 April 2016 (see pages 73-74) which was formalised in the form at pages 75-79 of the bundle.

146. The claimant alleged that he had suffered detriments. The detriments relied upon by the claimant were paragraphs 5-44 of the claim form. (See note of discussion at the start of the hearing clarifying the detriments relied upon).

147. The questions for the Tribunal are:

(1) Did the respondent engage in any of the activities set out at paragraphs 5-44?

(2) Did they constitute a detriment?

(3) Was this because the claimant had submitted or proposed to submit such a flexible working request and/or a related grievance by way of email of 13 May 2016?

148. As a matter of logic before the Tribunal considered whether the facts relied upon at paragraphs 5-44 amounted to a detriment it took into account that the detriment must occur after the flexible working request was submitted which was on 29 April 2016 and/or after the related grievance was heard which was on 13 May 2016. Accordingly the Tribunal considered alleged detriments after 29 April 2016 i.e. paragraphs 24-44.

149. The Tribunal considered the alleged detriments in connection with annual leave at paragraphs 25, 26, 27 and 35. This concerned the claimant's request to his new Area Manager, Colette Baxter, for a day off for a funeral for compassionate leave; emailing Jenny Exford to follow up that request; the response of Jenny Exford granting the request for time off to attend the funeral shortly before the funeral and

the failure of Colette Baxter to respond to the claimant's request for three days' holiday in August made on 23 June 2016.

150. No evidence was adduced which might suggest that the reason Ms Baxter failed to respond to the holiday request for the funeral or failed to respond to the other holiday request was related to the claimant's application for flexible working. The evidence which was given was that the flexible working request (which was granted) was dealt with by the HR department and Mr Hall in particular. The Tribunal is satisfied by the respondent's explanation that the reason Ms Baxter did not respond to the claimant's initial holiday request was because she herself was away on holiday. The Tribunal accepts the evidence of Ms Exford that the volume of emails she receives daily was the reason for the delay in granting the time off for the funeral.

151. Ms Baxter had no clear explanation as to why she had delayed in responding to the claimant's time off for holiday requested in August, but no evidence of was adduced to suggest there was any causal connection with the flexible working request or the grievance, which was not heard by Ms Baxter.

152. Therefore although the Tribunal is satisfied that the matters in relation to annual leave are potentially matters of detriment, the Tribunal is not satisfied there is a causal connection with the flexible working application.

153. At paragraph 28 the claimant appears to complain that there was no witness or note taker present at the grievance hearing on 23 May 2016. The Tribunal is not satisfied that this amounts to a detriment within the meaning of **Shamoon v Chief Constable of Ulster Constabulary 2003 ICR 337**. The notes were taken by Mr Hall and the claimant offered the opportunity to be accompanied by a work colleague or a trade union officer (see page 92).

154. However, if the Tribunal is wrong about this and the lack of a witness or note take present could be said to amount to a detriment, the Tribunal is not satisfied that the claimant has any evidence to suggest that the reason there was no witness or note taker present was because he had made his flexible working request.

Alleged detriment at paragraph 29

155. "On 24 September 2016 Colette emailed questioning if the parental leave that was booked in for June had been previously authorised even though it had been authorised on 2 February 2016" – the Tribunal accepts that this could potentially amount to a detriment but relies on its findings that at this stage Ms Baxter was a new manager who had been in post for only three weeks and of those weeks one week she had been away on holiday, and that it is not unusual for new managers to check previously agreed dates of absence for employees for whom they are responsible. The Tribunal is not satisfied there is any causal connection with the claimant's flexible working application or his grievance.

Floor walk incident on 14 June – paragraphs 30, 31 and 32

156. The Tribunal finds that being told by Mr Orange, “this store is a car crash and it looks like a shit hole” is capable of amounting to a detriment as is being criticised on the shop floor, potentially in front of customers and in front of staff, as is being criticised in private by Colette Baxter for his performance.

157. The Tribunal turned to consider the causal connection. The claimant considered there was a relevant causal connection in that he had received a letter dated 14 June i.e. the same day as the visit to the store, which granted his flexible working request.

158. Mr Orange stated that it was no more than a coincidence that the store visit took place on the same day as the claimant received a letter granting his flexible working request.

159. The Tribunal heard convincing evidence from Ms Baxter and Mr Orange that the reason they visited on that day was because it was the first day of a sales promotion. Furthermore, the claimant was granted his flexible working request, it was not refused. Also no evidence was adduced by the claimant to establish that Ms Baxter and Mr Orange were aware of the timing of granting his flexible working request which was issued by Mr Hall on 14 June 2016.

160. Accordingly the Tribunal is not satisfied that the reason why the claimant was spoken to in the way that he was on 14 June 2016 was due to his flexible working request or his grievance in relation to it.

Detriment in relation to flexible working request – paragraph 33

161. The Tribunal is not satisfied there was a detriment in relation to this letter. The Tribunal relies on the guidance in **Shamoon v Chief Constable of Ulster Constabulary 2003 ICR 337**. The claimant's flexible working request was granted. Accordingly the Tribunal finds this can not amount to a detriment.

162. Accordingly this allegation does not succeed.

Detriment in relation to grievance – paragraphs 24, 28 and 34

163. The Tribunal turns first to consider the detriment. The Tribunal cannot see there is any detriment in relation to paragraph 24 which relates to the claimant’s email to Dave Wright who suggested that he should contact his area manager, or Mr Orange, or use the grievance procedure.

164. The Tribunal turns to paragraphs 28 and 34. The Tribunal has already found there was no detriment in relation to paragraph 28. The Tribunal turns to paragraph 34. The Tribunal relies on its finding of fact above that not all points raised were answered in the outcome of the grievance letter dated 20 June 2016. The Tribunal relies on its finding of fact that in particular the respondent failed to give a reason as to why sick pay had not been granted and failed to consider the supplementary matter in relation to holiday pertaining to document 79(a). The Tribunal accepts that

these matters amounted to a detriment although it notes the claimant did not appeal against the grievance outcome.

165. The Tribunal turns to causal connection. The Tribunal is not satisfied that the reason Mr Hall did not inform the claimant why his discretionary sick pay was not granted and the reason he failed to deal with the contents of 79(a) was because the claimant had made a flexible working application. The Tribunal finds that Mr Hall did not deal with 79(a) because it had not been sent to him. The Tribunal is not satisfied the claimant adduced any evidence to suggest that the reason Mr Hall did not inform him of the reason why he did not receive sick pay was his flexible working request. In fact Mr Hall granted his flexible working request, which seems at odds with the suggestion that he acted in a discriminatory fashion because the claimant had made such an application in the first place.

166. Accordingly this allegation fails.

Request to meet and meeting held on 5 July 2016 – paragraph 36 and 37

167. The Tribunal is not satisfied that there was any detriment in relation to the meeting of 5 July 2016 given that a meeting that the claimant requested took place and he had an opportunity to raise his concerns.

Detriment alleged at paragraph 38- The visit of Jenna Atkinson, Loss Prevention Regional Manager for the North West, on 6 July 2016

168. The Tribunal is not satisfied that the visit itself amounted to a detriment because the claimant conceded that was a routine part of the respondent's business. The Tribunal accepts that the failure to give feedback or discuss the audit or an action plan could amount to detriment.

169. The Tribunal turns to the issue of causal connection. There was no evidence to suggest that Jenna Atkinson, Loss Prevention Regional Manager, was aware of or had any knowledge of the claimant's flexible working application or his grievance. Accordingly the Tribunal is not satisfied there is any causal connection between the two matters.

Detriment alleged at paragraph 39 – Jenny Wildman working at the store from 12 July 2016 for one week

170. The Tribunal is satisfied that this amounts to a potential detriment given that the claimant said he found her to be distant and unfriendly.

171. No evidence was adduced to suggest that Jenny Wildman was aware of the flexible working request or the claimant's grievance. Accordingly in the absence of any evidence of causal connection this allegation fails.

Detriments in relation to the investigation and disciplinary process at paragraphs 40, 41, 42, 43 and 44

172. The Tribunal is satisfied that being asked to attend an investigatory meeting with Jenna Atkinson on 19 July 2016 and receiving a letter from Human Resources

inviting him to a disciplinary meeting on 4 August 2016 are capable of amounting to detriments.

173. The Tribunal turns to consider the causal connection. There was no evidence to suggest that Jenna Atkinson, who conducted the investigatory meeting, was aware of the flexible working request or the grievance. Accordingly the claimant has not satisfied us of any facts which could suggest there was a causal connection between the two matters.

174. So far as the decision to commence disciplinary proceedings is concerned, it was not established who made that decision. The Tribunal relies on the evidence of Ms Exford that it was standard procedure to consider disciplinary proceedings where a store audit was less than 85%. The claimant did not adduce any evidence to suggest that the reason he received an invitation to a disciplinary hearing on 4 August 2016 was because he had made a flexible working request or lodged a grievance, other than the fact the two matters occurred close in time.

175. Given Ms Exford's evidence that it was standard procedure to consider disciplinary action against an individual with a score from a security audit, the Tribunal is satisfied that there is a non discriminatory explanation for the treatment and accordingly that allegation fails.

176. Therefore the claimant's claim for detriment in relation to making a flexible working request does not succeed.

Direct sex discrimination

177. The Tribunal reminded itself of the List of Issues. The claimant alleged that the facts relied upon at paragraphs 5-44 of the claim form amounted to less favourable treatment on the grounds of sex. He alleged a hypothetical female in the same position would not have been subjected to this treatment. He also alleged that a hypothetical female would not have been dismissed because of a request regarding childcare.

178. The first issue is: did the respondent engage in any of the activities set out at paragraphs 5-44? If so, did the respondent treat the claimant less favourably than a hypothetical comparator because of his gender?

179. The Tribunal reminded itself of the two stage process in discrimination cases. We reminded ourselves that the claimant must prove facts from which we could conclude in the absence of an adequate explanation that the respondent had committed an unlawful act of discrimination (see **Madarassy v Nomura International PLC [2007] IRLR 246**).

180. The Tribunal reminded itself that a difference in treatment and a difference in gender is not sufficient. There must be a "something more" to shift the burden of proof.

181. The Tribunal turns to consider the allegations as previously considered:

Enforced shift change – paragraphs 5, 6, 7 and 8

(1) The evidence produced shows that the change in shift pattern was in relation to all store managers (see page 52). The claimant's evidence in relation to the shift change was that it put him as a new parent at a disadvantage because of his childcare responsibilities. He needed to be at the childminder promptly and that was why the new shift pattern caused him difficulty. There was no evidence to suggest that the treatment of a hypothetical female store manager with childcare responsibilities would have been treated any differently. In the absence of any facts adduced by the claimant to suggest that the reason he was treated the way he was in relation to gender means this claim must fail.

(2) The Tribunal reminds ourselves that it is necessary for us to draw inferences in a discrimination case to shift the burden. However, we are not satisfied there is any evidence in this case which allows us to shift the burden to the respondent.

Parental leave – paragraphs 9, 11, 14 and 29

(3) The Tribunal relies on its findings of fact that there were three requests for parent leave: one was granted, one was refused and the third was withdrawn by the claimant. In relation to the request which was refused the Tribunal is not satisfied that the claimant has adduced facts which could suggest that the reason for a difference in treatment was his gender. The claimant relied on evidence that a Payroll Manager, Linda Walsh, had told him that he was the only JD Sports employee that she had only ever dealt with as making a request for parental leave. The claimant also suggested that of the three parental leave requests referred to by Mr Hall, all were his to suggest the burden of proof should shift.

(4) The Tribunal is not satisfied that this is evidence which suggests a hypothetical female requesting parental leave would have been treated any differently.

(5) However, if we are wrong about this and the burden of proof has shifted to the respondent we are satisfied that the respondent has a non discriminatory explanation for the refusal of one occasion of parental leave, namely the business reasons referred to in Jackie Grant’s email.

Sick leave/illness – paragraphs 12, 15, 16, 18, 21 and 22

(6) The Tribunal relies on its findings of fact. The Tribunal is not satisfied that there was any evidence to suggest that a female parent of a young child would have been treated any differently in relation to receiving the holiday blackout dates or having the new shift rota imposed on 25 March 2016. There is no evidence to suggest that a female employee with a young child who then went absent with work related stress would

not have been treated any differently to the claimant in being refused company sick pay and being refused an explanation for it. The Tribunal reminded itself that the appropriate comparator is a person in the same circumstances as the claimant but without the same protected characteristic.

(7) Accordingly in the absence of any evidence to shift the burden the claimant's claim for discriminatory treatment in relation to sick leave/illness fails.

Flexible leave application – paragraphs 23, 28 and 33

(8) The claimant made a flexible leave request which was granted. In the first instance the Tribunal is not satisfied that the claimant has adduced facts to suggest he was treated less favourably than a hypothetical female in the same set of circumstances.

(9) However, if we are wrong about this and it can be said that the evidence that the claimant relied on by the claimant in relation to the comment by the Payroll officer or the fact that there were very few parental leave applications made to the respondent, the Tribunal is satisfied that the respondent showed a non discriminatory reason because it granted the request.

Allegations in relation to grievance – paragraphs 24, 28 and 34

(10) The Tribunal relies on our findings of fact in relation to the grievance (see above).

(11) The claimant has not adduced any evidence to suggest that a woman with childcare responsibilities in the same set of circumstances as he was would have been treated any differently. Accordingly the Tribunal is not satisfied that the burden of proof has shifted and this claim fails.

Floor walk incident on 14 June 2016 – paragraphs 30, 31 and 32

(12) The Tribunal relies on its findings of fact above. The Tribunal is not satisfied that the claimant has adduced any evidence to suggest that a female store manager with the same childcare responsibilities would have been treated any differently to the claimant and accordingly this allegation does not succeed.

Requests to meet and meeting taking place – paragraphs 36 and 37

(13) The Tribunal relies in our findings of fact that following the claimant's request a meeting took place. The Tribunal is not satisfied that the claimant has adduced facts which could suggest that he was treated less favourably than a real or hypothetical comparator in the same set of circumstances, namely a woman with a young child. Accordingly this allegation does not succeed.

Store audit – paragraph 38

(14) The Tribunal relies on its finding of fact. The Tribunal is not satisfied that the claimant has adduced evidence to suggest that the reason he received a store audit was because he was a man. The Tribunal finds that a woman in the same set of circumstances would have been treated in the same way.

(15) However, if we are wrong about this and the burden of proof has shifted then we are satisfied that the respondent has adduced a non discriminatory explanation, namely that the reason for the store security audit was a routine part of the checks conducted in stores on a regular basis.

Jenny Wildman at the store – paragraph 39

(16) The Tribunal relies on its finding of fact. The Tribunal is not satisfied that the claimant has adduced any evidence to suggest that the reason Jenny Wildman attended the store during that period was because he was a man.

(17) However, if the Tribunal is wrong about that and the burden of proof has shifted the Tribunal finds there was a non discriminatory explanation for her attendance namely that she was placed there as a designate store manager as explained by Jenny Exford.

(18) Investigation and disciplinary process- paragraphs 40, 41, 42, 43 and 44.

(19) The Tribunal relies on its findings of fact above. The Tribunal is not satisfied the claimant has adduced any evidence to suggest a hypothetical female in the same set of circumstances as the claimant would have been treated any differently.

(20) However, if we are wrong about this and the burden of proof has shifted we are satisfied that there is a non discriminatory explanation for the treatment, namely there were allegations made by Jenny Wildman which were matters sufficiently serious to require investigation. We also rely on the evidence of Ms Exford that it was common to institute disciplinary proceedings where a security audit result was less than 85%.

182. Accordingly the claimant's claims for sex discrimination fail.

183. **The Tribunal considered the claimant's contention that there had been a breach of the ACAS code of Practice and that any compensation should be uplifted. The Tribunal reminded itself of the provisions of the Code of Practice. The Tribunal reminded itself that those provisions allow for an employee to raise a grievance, for it to be considered at a meeting and that the employer should: "*Following the meeting decide on what action, if any, to take. Decisions should be communicated to the employee, in writing, without unreasonable delay and, where appropriate, should set out what action the employer intends to take to resolve the grievance. The employee should be informed that they can appeal if they are not content with the action taken*."**

184. **We have found in this case the respondent held a meeting with the claimant and communicated an outcome although we found it did not address all the claimant's concerns.**

185. **However the ACAS Code then states: "*Where an employee feels that their grievance has not been satisfactorily resolved they should appeal. They should let their employer know the grounds for their appeal without unreasonable delay and in writing*." There is no dispute that the claimant was offered an opportunity to appeal but did not do so.**

186. **We turned to consider whether there has been a breach of the Code. We are not satisfied that there has been, given the way the Code is worded. We are not satisfied failure to deal with some of the concerns is a breach. However if we are wrong about that we must consider whether it is just and equitable to uplift the compensatory award. We are not satisfied it is just and equitable to do so because the claimant had an opportunity to raise the unresolved matters at an appeal but chose not to do so.**

187. **We turn to consider whether there should be any reduction in the award because of the claimant's failure to appeal the grievance. We must consider whether the failure was unreasonable. We are not satisfied it was. However if we are wrong about this we must consider whether it is just and equitable to reduce any compensatory award. We are not satisfied it is just and equitable to reduce the award. The claimant had raised a grievance and although all his concerns had not been considered, part of his grievance had been satisfactorily addressed namely his flexible working application. We do not consider it just and equitable to penalise the claimant for failure to present an appeal in circumstances where part of his grievance was successful.**

188. The case will proceed to a remedy hearing

Employment Judge Ross

Date 24 May 2017

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

25 May 2017

FOR THE TRIBUNAL OFFICE